A **BUMIPUTRA-COMMERCE BANK BERHAD**

v.

AUGUSTO POMPEO ROMEI & ANOR

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02-2282-09-2011]
C 12 DECEMBER 2013

COMPANY LAW: *Directors - Resolutions - Whether void and of no effect - Directors' Resolution purportedly passed giving approval to create third party charge - Allegation of fraud and forgery - Whether there were* D *forged signatures on resolution - Whether Directors Resolution an internal matter - Turquand's Rule - Whether third party charge validly created notwithstanding Directors' Resolution tainted with illegality - Whether appellant's title and interest in third party charge indefeasible - Whether appellant an innocent party and protected by s. 340(1) National Land* E *Code*

LAND LAW: *Indefeasibility of title and interest - Third party charge - Whether void and unlawful - Directors' Resolution purportedly passed giving approval to create third party charge - Allegation of fraud and* F *forgery - Whether there were forged signatures on resolution - Whether Directors Resolution an internal matter - Turquand's Rule - Whether third party charge validly created notwithstanding Directors' Resolution tainted with illegality - Whether appellant's title and interest in third party charge indefeasible - Whether accepted in good faith and valuable* G *consideration - Whether appellant an innocent party and protected by s. 340(1) National Land Code*

CIVIL PROCEDURE: *Parties - Locus standi - Commencement of suit - Locus standi of parties who were not registered owners of property to commence suit - Suit brought in personal capacity and not derivative* H *action - Whether respondents did not have locus standi - Whether claim did not come within principle of Foss v. Harbottle*

The appellant approved and disbursed term loan and overdraft facilities in the sum of RM400,000 to Malaysian Aerosols I Manufacturer Sdn Bhd ('Malaysian Aerosols'). In consideration thereof, a third party charge over a piece of property owned by

Quickpack (M) Sdn Bhd ('the fourth defendant') was executed by the fourth defendant in favour of the appellant. The fourth defendant was wound up on 24 August 2001 and the Official Receiver was appointed as the liquidator. The respondents and the first defendant were directors and shareholders of the fourth defendant while the second defendant was a director of the fourth defendant. A Directors' Resolution of the fourth defendant was purportedly passed on 3 April 1999 giving approval and authority to the directors of the fourth defendant to execute the relevant documents for the creation of the third party charge over its property as security for the banking facilities granted to Malaysian Aerosols. The third party charge in Form 16A National Land Code was then executed by the first and second defendants as directors of the fourth defendant on 2 August 1999. The respondents denied having signed the Directors' Resolution and pleaded that they were forged by the first and second defendants. According to the respondents, the third party charge in favour of the appellant had been created without their knowledge or consent. The respondents filed a suit against the appellant and three others, namely the first, second and fourth defendants for the following reliefs, *inter alia* (i) a declaration that the purported signatures of the respondents as appearing on the Directors' Resolution of the fourth defendant was of no legal effect thereby rendering it void and unlawful and (ii) a declaration that the third party charge purportedly granted in favour of the appellant was void and unlawful. The appellant relied mainly on the valid third party charge which was duly executed by the fourth defendant, although it was premised on an invalid Directors' Resolution pursuant to the principle laid down in *Royal British Bank v. Turquand* ('*Turquand*'s Rule'). The High Court, in allowing the respondents' suit and allowing the two declarations sought, held that the Directors' Resolution did not exist legally for all intents and purposes and therefore did not give any valid authority for the consequential execution of any document by one or two directors of the fourth defendant. Dissatisfied, the appellant filed its appeal to the Court of Appeal. The issues raised herein were (i) whether the respondents had the *locus standi* to commence the suit against the appellant; (ii) whether the signatures of the respondents in the Directors' Resolution were forgeries; (iii) whether the internal management rule (*Turquand*'s Rule) applied; and (iv) whether the third party charge was defeasible.

Held (allowing appeal)
Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) The respondents did not have the *locus standi* to commence this suit in their personal names and capacity against the appellant as they were merely contributories of the fourth defendant and not the registered owners of the property, the subject matter of the third party charge. The registered owner of the property was the fourth defendant and the third party charge was executed between the appellant and the fourth defendant, not between the appellant and the respondents. The suit by the respondents was brought in their personal capacity and was not a derivative action brought on behalf of the fourth defendant, thus it did not come within the well-established principle of *Foss v. Harbottle*. (paras 18 & 19)

(2) Given the undisputed fact that the respondents had denied signing the Directors' Resolution and that there was no reason whatsoever to doubt the veracity of their evidence especially since there was no other or opposing handwriting expert's report to contradict or contravene the report of PW3 (the handwriting examiner/expert), the court was prepared, on a balance of probabilities, to uphold the finding of the trial judge that the signatures of the respondents were indeed forgeries. Proper consideration and weight was given to PW3's report in the context of the evidence of the respondents. It was sufficiently corroborated by the evidence of the respondents and was in satisfaction of the provisions of s. 73(1) of the Evidence Act 1950. (para 34)

(3) The Directors' Resolution purportedly passed by the Board of Directors of the fourth defendant was an "internal matter" in which the appellant was not involved nor was made aware of. It was the Directors' Resolution which was said to be a forgery and was therefore void and of no effect. On the other hand, the third party charge was sufficiently executed by the first and second defendants. Further, the Memorandum and Articles of Association of the fourth defendant clearly allowed for two directors to execute any documents under seal on behalf of the company. Although the first and second defendants did not have the authority, actual or ostensible, to

forge the signatures of the respondents on the Directors' Resolution, they had the ostensible authority to execute and create the third party charge in favour of the appellant, who had no notice or knowledge of any wrongdoing on the part of the first and second defendants. Applying the *Turquand*'s Rule, the appellant was correct to presume that the third party charge had been validly created notwithstanding that it was premised on a Directors' Resolution which was tainted with illegality. (paras 43-45, 51 & 53)

(4) The appellant's title and interest in the third party charge was indefeasible as the charge was accepted in good faith and for valuable consideration. The appellant was an innocent party and its position was protected by s. 340(1) of the National Land Code as there was no evidence to suggest that the appellant had knowledge of the forged Directors' Resolution. Further, it was not wrong for the appellant to presume, relying on the internal management rule, that the first and second defendants had the authority to execute Form 16A on behalf of the fourth defendant. (para 55)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah meluluskan dan mengeluarkan bayaran kemudahan pinjaman berjangka dan overdraf dalam jumlah RM400,000 kepada Malaysian Aerosols Manufacturer Sdn Bhd ('Malaysian Aerosols'). Sebagai balasan, satu gadaian pihak ketiga ke atas sebuah hartanah yang dimiliki oleh Quickpack (M) Sdn Bhd ('defendan keempat') telah dilaksanakan oleh defendan keempat memihak kepada perayu. Defendan keempat telah digulung pada 24 Ogos 2001 dan Pegawai Penerima telah dilantik sebagai likuidator. Responden-responden dan defendan pertama adalah pengarah dan pemegang saham defendan keempat manakala defendan kedua adalah pengarah defendan keempat. Satu Resolusi Pengarah defendan keempat dikatakan telah diluluskan pada 3 April 1999 yang telah memberi kebenaran dan autoriti kepada pengarah defendan keempat untuk melaksanakan dokumen-dokumen yang relevan bagi pembentukan gadaian pihak ketiga ke atas tanah tersebut sebagai jaminan untuk kemudahan perbankan yang diberikan kepada Malaysian Aerosols. Gadaian pihak ketiga dalam Borang 16A Kanun Tanah Negara kemudiannya dilaksanakan oleh defendan pertama dan kedua sebagai pengarah defendan keempat pada

2 Ogos 1999. Responden menafikan bahawa mereka telah menandatangani Resolusi Pengarah tersebut dan memplidkan bahawa ia telah dipalsukan oleh defendan pertama dan kedua. Menurut responden, gadaian pihak ketiga yang memihak kepada perayu telah dibentuk tanpa pengetahuan atau kebenaran mereka. Responden telah memfailkan satu guaman terhadap perayu dan tiga pihak lain iaitu defendan pertama, kedua dan keempat untuk relif, antara lain (i) satu pengisytiharan bahawa tandatangan responden yang terdapat dalam Resolusi Pengarah defendan keempat tidak mempunyai kesan undang-undang; dan dengan itu adalah terbatal dan bertentangan dengan undang-undang; dan (ii) satu pengisytiharan bahawa gadaian pihak ketiga yang telah diberikan memihak kepada perayu adalah terbatal dan menyalahi undang-undang. Perayu telah merujuk kepada gadaian pihak ketiga yang telah dilaksanakan oleh defendan keempat, walaupun ia berdasarkan Resolusi Pengarah yang tidak sah menurut prinsip-prinsip yang telah dibentangkan dalam *Royal British Bank v. Turquand* ('peraturan *Turquand*'). Mahkamah Tinggi, dalam membenarkan guaman responden dan membenarkan pengisytiharan yang telah dituntut, memutuskan bahawa Resolusi Pengarah tidak wujud secara sah untuk segala tujuan dan maksud dan oleh itu tidak memberikan apa-apa autoriti yang sahih bagi pelaksanaan mana-mana dokumen yang berbangkit oleh satu atau dua pengarah defendan keempat. Tidak berpuas hati, perayu telah memfailkan rayuan kepada Mahkamah Rayuan. Isu-isu yang timbul adalah (i) sama ada responden mempunyai *locus standi* untuk memulakan guaman ini terhadap perayu; (ii) sama ada tandatangan responden dalam Resolusi Pengarah adalah palsu; (iii) sama ada peraturan pengurusan dalaman (Peraturan *Turquand*) terpakai; dan (iv) sama ada gadaian pihak ketiga tersebut boleh disangkal.

Diputuskan (membenarkan rayuan)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Responden-responden tidak mempunyai *locus standi* untuk memulakan guaman ini dalam nama peribadi dan kapasiti mereka terhadap perayu kerana mereka hanya penyumbang kepada defendan keempat dan bukan pemilik yang berdaftar tanah, iaitu hal perkara gadaian pihak ketiga. Pemilik berdaftar tanah itu adalah defendan keempat dan gadaian pihak ketiga telah dilaksanakan antara perayu dan defendan keempat, bukan

antara perayu dan responden-responden. Guaman oleh responden-responden telah dibawa dalam kapasiti peribadi mereka dan bukan tindakan derivatif yang dibawa bagi pihak defendan keempat, oleh itu ia tidak termasuk dalam lingkungan prinsip mantap *Foss v. Harbottle*.

(2) Memandangkan terdapat fakta yang tidak boleh dipertikaikan bahawa responden telah menafikan menandatangani Resolusi Pengarah dan tiada sebab untuk meragui kebenaran keterangan mereka terutama sekali kerana tiada laporan pakar tulisan tangan lain yang dikemukakan untuk bercanggah atau melanggar laporan yang diberikan oleh PW3 (pakar/pemeriksa tulisan tangan), mahkamah bersedia atas imbangan kebarangkalian untuk mempertahankan dapatan hakim bicara bahawa tandatangan responden adalah palsu. Pertimbangan yang wajar telah diberikan kepada laporan PW3 dalam konteks keterangan responden. Ia disokong secukupnya oleh keterangan responden dan memenuhi peruntukan s. 73(1) Akta Keterangan 1950.

(3) Resolusi Pengarah yang telah diluluskan oleh lembaga pengarah defendan keempat adalah "perkara dalaman" di mana perayu tidak terlibat dan tidak mempunyai pengetahuan berkenaannya. Ia adalah Resolusi Pengarah yang dikatakan adalah pemalsuan dan oleh itu terbatal dan tidak mempunyai kesan. Manakala, gadaian pihak ketiga telah dilaksanakan secukupnya oleh defendan pertama dan kedua. Selanjutnya, Memorandum dan Perkara-Perkara Persatuan defendan keempat dengan jelasnya membenarkan dua pengarah untuk melaksanakan mana-mana dokumen yang dimeteraikan bagi pihak syarikat. Walaupun defendan pertama dan kedua tidak mempunyai autoriti, benar atau kononnya, untuk memalsukan tandatangan responden di Resolusi Pengarah, mereka mempunyai autoriti kononnya untuk melaksanakan dan membentuk gadaian pihak ketiga memihak kepada perayu, yang tidak mempunyai notis atau pengetahuan berkenaan apa-apa salahlaku bagi pihak defendan pertama dan kedua. Menggunapakai Peraturan *Turquand*, perayu betul dalam menganggap gadaian pihak ketiga telah dibentukkan secara sah walaupun ia berasaskan Resolusi Pengarah yang telah dicemari dengan kesalahan undang-undang.

(4) Hak milik dan kepentingan perayu dalam gadaian pihak ketiga tidak boleh disangkal kerana gadaian itu telah diterima dengan niat yang baik dan untuk balasan bernilai. Perayu adalah pihak yang tidak bersalah dan kedudukannya dilindungi oleh s. 340(1) Kanun Tanah Negara kerana tiada keterangan yang mencadangkan bahawa perayu mempunyai pengetahuan berkenaan Resolusi Pengarah yang telah dipalsukan. Selanjutnya, tidak salah untuk perayu menganggap, bergantung pada peraturan pengurusan dalaman, bahawa defendan pertama dan kedua mempunyai autoriti untuk melaksanakan Borang 16A bagi pihak defendan keempat.

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Bumiputra Merchant Bankers Bhd v. Supreme-QBE Insurance Bhd [1988] 2 CLJ 445; [1988] 1 CLJ (Rep) 394 HC ***(refd)***

CS Petrolium (M) Sdn Bhd v. Public Bank Berhad & Other Cases [2011] 1 LNS 1349 HC ***(refd)***

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QBD 480 ***(refd)***

Greenwood v. Martins Bank Ltd [1933] AC 51 ***(refd)***

Hua Rong Finance Ltd v. Mega Capital Enterprise Ltd [1998] 4 HKC 532 ***(refd)***

Kelapa Sawit (Teluk Anson) Sendirian Berhad v. Dr Yeoh Kim Leng & 4 Ors [1991] 1 MTC 33 ***(refd)***

Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien [2001] 1 CLJ 316 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***

Negara Traders Ltd v. Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 LNS 118 HC ***(refd)***

Northside Developments Pty Ltd v. Registrar General & Ors [1989] 2 ACSR 161 ***(refd)***

People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors [1985] 1 LNS 158 HC ***(refd)***

Public Bank Bhd v. Metro Construction Sdn Bhd [1991] 1 CLJ 787; [1991] 3 CLJ (Rep) 479 HC ***(refd)***

Royal British Bank v. Turquand (1856) 119 ER 474 ***(foll)***

Ruben v. Great Fingall Consolidated [1906] AC 439 ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(dist)***

Uxbridge Permanent Benefit Building Society v. Pickard [1939] 2 All ER 344 ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 20(1)
Evidence Act 1950, s. 73(1)
National Land Code, s. 340(1), (2)(b)

Other source(s) referred to:
Loh Siew Cheang, *Corporate Powers Accountability*, 2nd edn, p 1146

For the appellant - S Ramesh (Gary Yap with him); M/s Adnan Sundra & Low
For the respondents - Avtar Singh (Amarjeet Singh with him); M/s Avtar

[Editor's note: For the High Court judgment, please see Augusto Pompeo Romei & Anor v. Singaravelu Ratnavelu & Ors [2011] 1 LNS 949.]

Reported by Suhainah Wahiduddin

JUDGMENT

Mah Weng Kwai JCA:

Brief Facts

[1] In 1999, the appellant approved and disbursed term loan and overdraft facilities in the sum of RM400,000 to Malaysian Aerosols Manufacturer Sdn Bhd (Malaysian Aerosols). In consideration thereof, a third party charge over a piece of property owned by Quickpack (M) Sdn Bhd (the fourth defendant) was executed by the fourth defendant in favour of the appellant. The fourth defendant was wound up on 24 August 2001 and the official receiver was appointed the liquidator.

[2] The respondents and Singaravelu s/o Ratnnavelu (the first defendant) were at all material times directors and shareholders of the fourth defendant while Amudah Devi d/o Maruthamuthu (the second defendant) was a director of the fourth defendant. The first and second defendants were also the directors of Malaysian Aerosols.

[3] A directors' resolution of the fourth defendant was purportedly passed on 3 April 1999 giving approval and authority to the directors of the fourth defendant to execute the relevant documents for the creation of the third party charge over its property as security for the banking facilities granted to Malaysian Aerosols.

[4] The third party charge in form 16A, National Land Code 1965 was then executed by the first and the second defendants as the directors of the fourth defendant on 2 August 1999 and was registered with the Selangor Land Office on 9 August 1999.

Respondents' Position

[5] The respondents deny having signed the directors' resolution and plead that they were forged by the first and second defendants, the existence of which only came to their knowledge subsequently. The third party charge in favour of the appellant had been created without their knowledge, consent or approval in their capacity as directors and/or shareholders of the fourth defendant. The respondents' case was supported by the absence/non existence of any resolution on the third party charge duly certified by the company secretary kept in the books of the fourth defendant nor was there any entry or record of the resolution in the statutory books of the fourth defendant.

[6] Upon discovery the respondents filed a suit against the appellant and three others namely the first, second and fourth defendants for the following *inter alia*, reliefs:

(a) a declaration that the purported signatures of the respondents as appearing on the directors' resolution dated 3 April 1999 of the fourth defendant are of no legal effect thereby rendering the said resolution void and/or unlawful;

(b) a declaration that the third party charge dated 2 August 1999 *vide* Resolution No 6113/99, Jilid No 773, Folio 5, purportedly granted in favour of the appellant is void and/or unlawful.

Appellant's Position

[7] The appellant's position was that it relied mainly on the valid third party charge which was duly executed by the fourth defendant, although it was premised on an invalid directors' resolution pursuant to the principle laid down in the case of *Royal British Bank v. Turquand* (1856) 119 ER 474 (Turquand's Rule) to wit, that a person contracting with a company and dealing in good faith may presume that acts performed within the company's constitution and powers were duly performed and the person is not bound to inquire whether acts of internal management have been regularly complied with.

[8] The appellant also relied on s. 20(1) of the Companies Act 1965 on *ultra vires* transactions, which provides that no act or purported act of a company shall be invalid by reason only of the fact that the company has without capacity or power to do the act. In support of its contention, counsel for the appellant cited the cases of *Bumiputra Merchant Bankers Bhd v. Supreme QBE Insurance Bhd* [1988] 2 CLJ 445; [1988] 1 CLJ (Rep) 394; [1990] 2 MLJ 247 and *Public Bank Bhd v. Metro Construction Sdn Bhd* [1991] 1 CLJ 787; [1991] 3 CLJ (Rep) 479. In the latter case, Lim Beng Choon J held that s. 20(1) of the Act abolished the otherwise rigorous effect of the *ultra vires* doctrine namely, even where a third party charge was *ultra vires* the company's memorandum and articles of association, this could be saved by s. 20(1).

Decision Of The High Court

[9] After a full trial in which the appellant elected not to call any witnesses and relied on its submission, the learned trial judge found as of fact that the signatures of the respondents on the directors' resolution had been forged by the first and second defendants and as the resolution had not been signed by all the directors of the fourth defendant, the provisions of art. 119 of the articles of association had not been complied with and accordingly there was no valid resolution passed. The learned trial judge held that the directors' resolution did not exist legally for all intents and purposes and therefore did not give any valid authority for the consequential execution of any document by (only) one or two directors of the fourth defendant (and not by all the four directors).

[10] The learned trial judge held that the use of the common seal of the fourth defendant was not within the purport of art. 121 of the company's articles of association and thus the third party charge was not valid as the authority of the board of directors to use it had not been lawfully given.

[11] The learned trial judge also rejected the claim of indefeasibility of the third party charge by the appellant on the ground that the charge was accepted in good faith and for valuable consideration on the premise that the third party charge was registered based on the forged directors' resolution, a void instrument, and as such the charge was liable to be set aside under s. 340(2)(b) of the National Land Code.

[12] Accordingly, the learned trial judge held that the respondents had proven their case and allowed the two declarations sought with damages to be assessed together with interest and costs.

Appeal By The Appellant

[13] Being dissatisfied with the decision of the High Court, the appellant filed its appeal to the Court of Appeal.

Issues To Be Determined By The Court Of Appeal

[14] The main issues raised by the appellant in the memorandum of appeal, inclusive of the issue of *locus standi* after leave to amend the memorandum of appeal was granted were *inter alia*, as follows:

(a) whether the respondents had the *locus standi* to commence the suit against the appellant;

(b) whether the signatures of the respondents in the directors' resolution of 3 April 1999 were forgeries; and

(c) whether the internal management rule (Turquand's Rule) applied to enable the appellant to presume that the directors' resolution was validly passed and the third party charge validly created.

(d) whether the third party charge was defeasible.

Decision Of The Court

[15] Upon reading the record of appeal, the written submissions of counsel for the appellant and respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appeal with costs.

[16] Being dissatisfied with the decision of the court the respondents have now applied for leave to appeal against the said decision in the Federal Court.

Grounds Of Decision

Issue 1 - Whether The Respondents Had The Locus Standi To Commence This Suit Against The Appellant

[17] It was unanimously decided by the court that the respondents did not have the *locus standi* to commence this suit in their personal names and capacity against the appellant as they are

merely contributories of the fourth defendant and not the registered owners of the property, the subject matter of the third party charge.

[18] At all material times, it was an undisputed fact that the registered owner of the property is the fourth defendant and not the respondents and that the third party charge was executed between the appellant and the fourth defendant and not between the appellant and the respondents. That being the case, the court held that the respondents are not privy to the third party charge and hence did not have the *locus standi* to commence this action against the appellant.

[19] The suit by the respondents was brought in their personal capacity and was not a derivative action brought on behalf of the fourth defendant. It was a claim by the respondents as shareholders for damages for the benefit of themselves and not for the fourth defendant, the company. As the claim was neither a derivative action nor a minority action, it did not come within the well established principle of *Foss v. Harbottle* [1843] 67 ER 189.

[20] The meaning of a derivative action was succinctly explained by Gopal Sri Ram JCA (as he then was) when delivering the judgment of the Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551. This is what His Lordship said:

> A derivative action is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs, and will not, for that reason permit an action to be brought in its name. In this circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. But in so doing he must cite the company and the wrongdoers as defendants and the title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so, and further, there must be an express statement in the pleading that the action is being brought for the benefit of the company. A plaintiff in a derivative action cannot thus sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company.

[21] Further, Loh Siew Cheang in his book *Corporate Powers Accountability*, 2nd edn., at p. 1146 opined that if the action is to recover loss suffered by the company on a completed *ultra vires* transaction, then a derivative action must be brought as the injured party is the company itself.

[22] There was nothing pleaded in the respondents' amended statement of claim to even suggest that the claim was a derivative action brought for the benefit of the fourth defendant. (See *Kelapa Sawit (Teluk Anson) Sendirian Berhad v. Dr Yeoh Kim Leng & Ors* [1991] 1 MTC 33; [1991] 1 SCR 415).

[23] It is trite law that a company is a separate legal entity from its shareholders and directors. (See *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors* [1985] 1 LNS 158; [1986] 1 MLJ 68). Accordingly the respondents' suit founded on fraud and forgery should have been brought by the fourth defendant, the company itself being the registered owner of the property, against the first and second defendants and Malaysian Aerosols and not by themselves.

[24] Although the issue of *locus standi* was not an issue included in the issues to be tried before the learned trial judge, it was nonetheless pleaded by the appellant in para. 8.12 of its amended defence and leave to appeal on this ground was granted by the Court of Appeal on 4 January 2013. This court was keen to hear arguments by counsel for the appellant and the respondents on this fundamental issue of *locus* which went to the jurisdiction of the trial court and to the heart of the matter. The court cannot agree with counsel for the respondents that just because the issue of *locus* was not included as an issue to be tried, it necessarily meant that it was implied that the respondents did have the *locus*.

[25] Where a party does not have the *locus standi* to bring an action, the court will not have the jurisdiction to determine the issue. In the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520, the Court of Appeal held as follows:

> Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has

> broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial Court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a Court lacking jurisdiction should be permitted to stand.

[26] Interestingly, counsel for the respondents submitted that the respondents' claim was not to cancel the third party charge but merely for a declaration that the charge was null and void. To our minds such a submission made little difference as the reliefs sought was really the flip side of the same coin.

[27] It is to be noted, with respect, that the issue of *locus* or the lack of it was neither addressed nor considered by the learned trial judge in his grounds of judgment. Be that as it may, this court is of the view that the lack of *locus* by the respondents by itself was sufficient for the court to allow the appeal and to set aside the order of the High Court.

[28] Notwithstanding the above, in the event this court is shown to be in error and it can be established by the respondents that they do have in law and in fact, the *locus standi* to bring this action then the court, relying on the operation of the Turquand's Rule will come to a similar conclusion that the appellant cannot be held liable to the respondents.

[29] For completeness, the Turquand's Rule and other issues raised in arguments by both counsel will now be considered below.

Issue 2 - Whether The Signatures Of The Respondents In The Directors' Resolution Of 3 April 1999 Were Forgeries

[30] The learned trial judge found as of fact that the signatures on the directors' resolution were forged by the first and second defendants. This court agreed with the finding and saw no reason to disturb that finding of fact.

[31] The respondents in their evidence had clearly stated that they did not sign the directors' resolution of 3 April 1999 and their evidence remained uncontroverted during cross-examination.

[32] Much was said by counsel for the appellant that the evidence of the handwriting examiner/expert (PW3) was inconclusive and that it was not safe for the court to conclude that the respondents' signatures were forgeries. Counsel for the appellant submitted that no original document containing the signatures of the respondents were given to PW3 for his analysis. The only documents forwarded to PW3 for examination were merely a photocopy of the directors' resolution and photocopies of other documents containing the signatures of the respondents. We are of the view that the complaint by counsel for the appellant seems misplaced as the original copy of the directors' resolution was in the possession of the appellant at all material times. Without having the opportunity to examine any original documents including the directors' resolution, PW3 in his evidence had candidly stated that his report was only a probable conclusion that the signatures purported to be those of the respondents were forgeries. PW3 qualified his report in that it required further assessment.

[33] The court is mindful that the use of photocopies of original documents in handwriting/signature analysis may result in inaccurate and inconclusive findings as fine hand or pen movements would not be detectable as was held in *CS Petrolium (M) Sdn Bhd v. Public Bank Berhad & Other Cases* [2011] 1 LNS 1349.

[34] The court is of the view that although the report of PW3 was not conclusive it nonetheless served to assist the court in its finding. (See *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153 (FC)). Given the undisputed fact that the respondents had denied signing the directors' resolution and that there was no reason whatsoever to doubt the veracity of their evidence especially since there was no other or opposing handwriting expert's report to contradict or contravene PW3's report, the court was prepared on a balance of probabilities (see *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497, FC, *Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien* [2001] 1 CLJ 316 and *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC), to uphold the finding by the learned trial judge that the signatures of the respondents were indeed forgeries. The court was entitled to give proper consideration and weight to the report of PW3 in

the context of the evidence of the respondents. It was sufficiently corroborated by the evidence of the respondents and was in our view in satisfaction of the provisions of the s. 73(1) of the Evidence Act 1950. In any event, the disputed signatures would have been compared by the learned trial judge himself with the genuine signatures of the respondents.

[35] The court is of the view that nothing much turns on the two subsidiary issues raised by counsel for the appellant namely, that PW3 was not given sufficient time to analyse the disputed signatures and to prepare his report and that the respondents had failed to provide any evidence that they were not in Malaysia at the time their signatures were forged. These were minor issues and did not detract from the finding that the respondents' signatures were forgeries.

Issue 3 - Whether The Internal Management Rule (Turquand's Rule) Applied In Favour Of The Appellant

[36] It was the appellant's case that it was entitled in law and in fact to presume under the internal management rule that the directors' resolution of the fourth defendant and the third party charge had complied with the various internal procedures stipulated in the memorandum and articles of association of the fourth defendant and that as a result of this, the fourth defendant was liable for the third party charge executed by the first and second defendants on its behalf.

[37] Under this rule, which is commonly referred to as the Turquand's Rule or the internal management rule, Lord Campbell CJ enunciated the principle as follows:

> ... persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.

[38] The appellant contended that pursuant to cls. 32 and 42 of its memorandum of association, the fourth defendant had the power and authority to consent to the creation of a third party charge over its property.

[39] Clauses 32 and 42 of the memorandum of association provide as follows:

> (32) To lend and advance money or give credit to such persons of companies and on such terms as may seem expedient, and in particular to customers and others having dealings with the Company, and to guarantee the performance of any contract or obligation and the payment of money of or by any such persons or companies and generally to give guarantees and indemnities.
>
> (42) To sell, lease, mortgage, or dispose of the land and other property, assets or undertaking of the Company or any part thereof for such consideration as the Company may think fit, and in particular for shares, stock, debentures, or other securities of any other company whether or not having objects altogether or in part similar to those of the Company.

[40] The appellant had accepted the third party charge in good faith and without notice of any irregularity in the directors' resolution of 3 April 1999.

[41] Apposite to this contention, the respondents submitted that the first and second defendants had acted in excess of authority and did not have the ostensible authority to pass the directors' resolution and to effect the third party charge. Counsel for the respondents relied largely on the *dicta* in *Ruben v. Great Fingall Consolidated* [1906] AC 439 and in *Negara Traders Ltd v. Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 LNS 118 and submitted that the Turquand's Rule does not apply to a forgery but merely to 'irregularities' in the management of the company "that otherwise may affect a genuine transaction".

[42] The learned trial judge also relied on the Hong Kong case of *Hua Rong Finance Ltd v. Mega Capital Enterprise Ltd* [1998] 4 HKC 532 wherein the court dismissed the plaintiff's case on the basis that a forged document is a nullity and, as such could not be "saved" by an application of the Turquand's Rule.

[43] Having considered the *dicta* in both *Ruben* and *Negara Traders*, the court is of the view that the Turquand's Rule is nonetheless applicable to this case given the facts and circumstances pertaining herein.

[44] To begin with, it is not in dispute that the first and second defendants were at all material times lawful directors of the fourth defendant. The directors' resolution purportedly passed by the board of directors of the fourth defendant was an "internal matter" in which the appellant was not involved nor was made aware of. The fraud and forgery denied by the respondents was a matter between the directors and the company. The fraud was pleaded against the first and second defendants and had nothing to do with the appellant. Importantly, it must be remembered that it is the directors' resolution which is said to be a forgery and is therefore void and of no effect. On the other hand, the third party charge was sufficiently executed by the first and second defendants, (without the signatories of the respondents) and there was no allegation of any forgery to taint the third party charge.

[45] Further, the memorandum and articles of association of the fourth defendant clearly allow for two directors to execute any documents under seal on behalf of the company. The third party charge was in fact executed by the first and second defendants with the use of the company seal and there was no reason for the appellant to suspect that anything untoward had occurred for them to be put on notice.

[46] The fact that that the first and second defendants had forged the directors' resolution meant that they did not have the authority to pass the resolution but this does not mean that they did not have the authority to execute the third party charge. The third party charge itself was not forged nor irregular in any form and as such the position in law is that the first and second defendants as directors of the fourth defendant had the ostensible authority to enter into the third party charge and thereby bind the fourth defendant. It will be noted that importantly, the first and second defendants ostensibly acting on behalf of the board could exercise all the powers of the fourth defendant to charge its property. It will be useful at this juncture to consider art. 97 of the articles of association of the fourth defendant which provides:

> The Board may exercise all the powers of the Company to borrow money and to mortgage or charge, its undertaking, property and uncalled capital or any part thereof and to issue debentures, debenture stock and other securities whether out-right or as security for any debt, liability or obligation of the Company or of any third party.

[47] In *Turquand*'s case, the court held that the transaction effected by the directors of the company without the prerequisite resolution was nonetheless valid. In this case, the appellant is entitled to presume that the internal procedures of the fourth defendant had been fully complied with and that the first and second defendants had the ostensible authority, (see *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QBD 480 at 503 for the meaning of "apparent" or "ostensible" authority) at the least, to execute the third party charge under seal in compliance with the articles of association of the fourth defendant. Article 121 of the articles of association expressly allowed the first and second defendants as directors of the fourth defendant to be in possession of the company seal. Article 121 of the articles of association reads as follows:

> The Directors shall provide for the safe custody of the seal which shall only be used by the authority of the Directors or of a Committee of the Directors authorized by the Directors in that behalf and every instrument to which the seal shall be affixed shall (subject to the provision of Article 11 in relation to share and debenture stock certificates and debentures) be signed by a Director and by the Secretary or by a second Director or by some other person appointed by the Directors for the purpose.

[48] To that extent it can be said that the entrustment of the company seal to the first and second defendants by the other directors constituted a "holding out" that they did have the authority to affix the seal and execute the third party charge on behalf of the fourth defendant.

[49] In the case of *Northside Developments Pty Ltd v. Registrar General & Ors* [1989] 2 ACSR 161 it was held that an instrument bearing a genuine seal and genuine signatures but executed without the authority of the company may be described as a forgery in the loose sense. A forgery in the strict sense, that is, an instrument bearing a false seal or signature, is binding on a company only if the company is estopped from denying both the falsity of the seal or signatures and the authority of the persons affixing the false seal or writing the false signature. But an instrument bearing a genuine seal and genuine signature, though it may be described as a forgery, is binding on the company if the company is estopped from denying the authority of the persons

affixing the genuine seal and writing the genuine signature. And at p. 186 Mason CJ delivering the judgment of the High Court of Australia said:

> Such an instrument, being regular in form, is binding on the company if it be executed for the purposes of the company's business or otherwise for the company's benefit and the party relying on it is not put on inquiry as to the authority of the persons who executed it to do so. If it transpires that the instrument was executed without the authority of the company, though it was apparently regular in form executed by officers or agents acting within the scope of their ordinary authority to execute such instruments, and used for the purposes of the company's business or otherwise for its benefit, the loss will fall on the company unless the party dealing with the company was put on inquiry. But if the party dealing with the company was put on inquiry and failed to make inquiry or, on inquiry, was not reasonably satisfied that the instrument was executed with the company's authority, the company will not be estopped from denying that it is bound by the instrument.

[50] To reiterate and at the expense of repetition, it was concluded by the court that there was no basis or reason for the appellant to inquire into the validity of the directors' resolution to determine whether it was validly executed by each of the directors of the fourth defendant. As can be seen, art. 97 of the articles of association of the fourth defendant gave the first and second defendants the power to charge the fourth defendant's property by way of a third party charge.

[51] Even in the case of *Negara Traders*, Raja Azlan Shah J (as His Highness then was) after holding that the internal management rule only applied to irregularities that might otherwise affect a genuine transaction and that it could not apply to a forgery, recognised that there are two exceptions namely, either the defendants are estopped from setting up the forgeries (see *Greenwood v. Martins Bank Ltd* [1933] AC 51) or that the impugned officer had such ostensible authority to render his employers (the company) liable for his act. To recap, while the court holds that the first and second defendants did not have authority, actual or ostensible, to forge the signatures of the respondents on the directors' resolution, they had in the circumstances of this case, the ostensible authority to execute and

create the third party charge in favour of the appellant, who had no notice or knowledge of any wrongdoing on the part of the first and second defendants.

In the *Northside Developments* case Mason CJ further held that "a company cannot give authority to fix a false seal and it is difficult to envisage a case in which there would be ostensible authority to write a false signature".

[52] The court is of the view that the learned trial judge was correct in holding that the directors' resolution can only be valid and effectual if it is signed by all the directors for the time being entitled to receive the notice of the meeting of the board. See art. 119 of the articles of association which reads as follows:

> A resolution signed by all the Directors for the time being entitled to receive notice of a meeting of the board shall be as valid and effectual as a resolution passed at a meeting of the Board duly convened and held and may consist of several documents in the like form each signed by one or more Directors.

[53] The first and second defendants cannot be said to have the ostensible authority to forge the signatures of the respondents and thereafter maintain that the directors' resolution is valid although tainted with fraud and forgery. But while the first and second defendants did not have the ostensible authority to forge the signatures of the respondents on the directors' resolution, they nonetheless had the ostensible authority to execute the third party charge. Applying the Turquand's Rule on internal management procedures, the appellant was correct to presume that the third party charge had been validly created notwithstanding that the third party charge was premised on a directors' resolution which was tainted with illegality.

[54] For this court to hold otherwise would be to impose an exceedingly unreasonable and onerous burden on the appellant to determine that the directors' resolution was not a forgery when the resolution seemingly appeared to have been *prima facie*, passed in accordance with the requirements of the memorandum and articles of association of the fourth defendant. The court cannot cast such a heavy duty on a third party when there is nothing to suggest any non-compliance of the memorandum and articles of association of the company or when the third party had not been

put on notice of any form of irregularity. To keep the wheels of business turning and to promote business efficacy and trading, it is important for the law to remain practical and relevant. It will be impractical for a third party to conduct a due diligence exercise before each and every transaction is entered into. Time constraints and the ensuing financial burden on a third party will prove insurmountable and will hinder the growth and progress in the financial world. As was held in the case of *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 All ER 344 that "it is quite obvious that the business of limited companies could never be carried on if everybody dealing with a company was at his peril bound to ascertain whether the internal administration of the company had been regularly conducted".

Issue 4 – Whether The Third Party Charge Was Defeasible

[55] On the issue of whether the third party charge was defeasible, the court is of the view that the appellant's title and interest in the third party charge was indefeasible as the charge was accepted in good faith and for valuable consideration. The appellant was an innocent party and its position was protected by s. 340(1) of the National Land Code 1965 as there was no evidence to suggest that the appellant had knowledge of the forged directors' resolution. In *OCBC Bank (M) v. Lee Lee Fah & Ors and Another Appeal* [2000] 1 MLJ 134, the court held that the chargee's interest was indefeasible unless there was evidence to show that the bank had knowledge of the fraud or forgery, or misrepresentation or where the title or interest was unlawfully acquired.

[56] Counsel for the respondents relied on the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 88 where it was held by the Federal Court that the two charges registered in favour of the third respondent were liable to be set aside under s. 340(2)(b) of the National Land Code as they were based on void instruments in that the relevant forms 16A were not executed by the appellant but by the first respondent pursuant to a forged Power of Attorney. With respect, we think that *Tai Ying Hong*'s case can be distinguished from the present case. Firstly, it must be remembered that the signatures on the form 16A were not forged. The form 16A was duly signed by the first and second defendants and sealed as directors of the fourth

A defendant while in *Tan Ying Hong*'s case the forged signature appeared in the form 16A itself. And secondly, it was not wrong for the appellant to presume, relying on the internal management rule, that the first and second defendants had the authority (ostensible) to execute the form 16A on behalf of the fourth
B defendant.

Conclusion

[57] In the result the appellant's appeal was allowed with costs. The third party charge created in favour of the appellant in
C consideration of the banking facilities extended to Malaysian Aerosols was held to be valid notwithstanding that the directors' resolution was void and therefore invalid.

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